87-1681

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JUAN CARLOS de la FUENTE, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May overwhelming evidence of guilt trigger application of the harmless error doctrine to prevent a mistrial when jurors in a drug case are exposed during trial to false newspaper reports that the Defendant was arrested in possession of drugs and truthful reports itemizing weapons and cash seized from the Defendant and suppressed as evidence at trial.

2. May a federal circuit court affirm a federal criminal conviction by disregarding facts contained in the record and refusing to address the issues raised by the Defendant.

PARTIES TO THE PROCEEDING

UNITED STATES OF AMERICA *
JUAN CARLOS de la FUENTE *
STEVEN ROBERT BOLLINGER
ROBERT JEROME McTEER
BRUCE HAYES MUNROE
JOHNNY DEAN HALL
OSCAR CRUZ-BARRIENTOS

*Juan Carlos de la Fuente is the only Petitioner before the Supreme Court and the United States of America is the only Respondent.

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OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, reported at 796 F.2d 1394 (11th Cir. 1986), appears in the appendix hereto. The opinion denying de la FUENTE's Petition for Rehearing, not yet reported, appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 15, 1986. The Eleventh Circuit denied a timely Petition for Rehearing on February 8, 1988, and on March 25, 1988, the Eleventh Circuit denied a timely Petition for Rehearing En Banc. This Petition for a Writ of Certiorari was timely filed within sixty days of that date as required by Rule 20 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

21 U.S.C. §848.

Continuing criminal enterprise
Penalties, forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in section 853 of this title.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subschapter II of this chapter --

(A) Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) From which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C.Code, secs 24-203 to 24-207), shall not apply.

STATEMENT OF THE CASE

A jury found de la FUENTE guilty of engaging in a continuing criminal enterprise (hereinafter "CCE"), conspiracy to import cocaine, importing cocaine, and possession of cocaine with intent to distribute. The jury failed to reach unanimous verdicts on the two remaining charges of conspiracy to possess marijuana and cocaine with intent to distribute and possession of marijuana. The jury also failed to reach unanimous decisions on the forfeiture of five properties itemized in the CCE count and unanimously found that the two remaining properties were not subject to forfeiture.

Throughout the trial, various indicted and unindicted co-conspirators testified regarding de la FUENTE's involvement in the distribution of marijuana and cocaine. The Government also presented considerable

testimony regarding de la FUENTE's practice of receiving large amounts of cash. This evidence was directly relevant to establishing the element of the CCE offense requiring the defendant to have obtained "substantial income" from illegal drug activity. In order to prove an element of the CCE offense requiring the illegal drug activity to be "continuing" in nature, the Government presented evidence that de la FUENTE and individuals allegedly directed by de la FUENTE on various occasions displayed weapons in attempts to collect debts.

At the close of the Government's case, de la FUENTE elected not to testify in his own defense because the absence of tangible evidence corroborating the testimony of Government witnesses militated in favor of a defense attacking the credibility of the witnesses on all counts listed in the indictment.

Prior to and during the trial, de la FUENTE had considered testifying in his own defense on the CCE charge that the individuals he allegedly "managed," "organized," or "supervised" were in reality independent drug distributors over whom he had no control whatsoever. Indeed, de la FUENTE had filed a pretrial motion to bifurcate the trial of the CCE charge so that he could present this testimony as a defense to that charge without incriminating himself before the jury on the remaining drug counts.[1] In lieu of presenting de la FUENTE's testimony to defend against the CCE charge, de la FUENTE's counsel delivered a three hour closing argument focusing exclusively on the Government's failure to adduce tangible evidence to corroborate the testimony of Government witnesses.

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[1]The trial court denied that motion.

After the jury had returned its verdicts, de la FUENTE's counsel learned that one juror, juror Hunter, had read pretrial and trial publicity reporting that a "raid" on de la FUENTE's home had uncovered drugs, large amounts of cash, and various weapons, and that juror Hunter had conveyed this information to "at least nine" jurors. Though a newspaper article had reported that "drugs" were seized by the authorities at de la FUENTE's home, that report was false. Various weapons and over $100,000 in cash had been seized by the authorities at de la FUENTE's home, but the trial court suppressed that evidence on Fourth Amendment grounds.

De la FUENTE filed a motion for new trial on the basis of the jurors' exposure to prejudicial publicity during the trial. At the hearing on that motion before the trial

court, juror Whiteway testified that, during the trial, juror Hunter referred to a newspaper article "two or three times" and repeated reports that "a raid was made on de la FUENTE's home" and that "$200-300,000 in cash had been found in a mattress." Juror Ingram testified that juror Hunter referenced a newspaper article reporting that de la FUENTE had been arrested in Volusia County.[2] Juror Whiteway testified that he heard juror Hunter "mentioning that he knew of a newspaper article in his hometown paper" in the presence of other jurors within three or four days prior to the beginning of deliberations. Juror Whiteway also testified that, immediately after the verdicts were returned, juror Hunter walked to his car in the parking lot to retrieve a newspaper

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[2]No evidence was presented at trial regarding de la FUENTE's arrest or the location thereof.

article that had been requested by juror Gates. Juror Gates admitted that she had told Mr. Hunter she would like to see the newspaper article at the conclusion of the trial and that juror Hunter gave her a newspaper article in the courthouse on the day the jury returned its verdicts. Juror Perry testified that juror Hunter made references to a newspaper article one morning in the jury room during deliberations. Juror Hunter, contradicting the testimony of every other juror, denied reading any newspaper articles or making references to newspaper articles in the presence of other jurors. The trial court denied de la FUENTE's motion for a new trial, holding that the jury improprieties were "harmless" in view of the "overwhelming" evidence of guilt presented at trial.

Approximately nine weeks after the trial court had denied de la FUENTE's initial motion for a new trial, de la FUENTE filed a motion for new trial on grounds of newly discovered evidence. The basis of this motion was the affidavit of juror Quick. De la FUENTE's counsel had made repeated efforts to contact and interview juror Quick in connection with his initial investigation into jury improprieties, but juror Quick was traveling in Europe and could not be contacted. Upon returning from Europe and being interviewed by de la FUENTE's counsel, juror Quick executed an affidavit stating that juror Hunter, in the presence of "all of the jurors," had referred to a newspaper article reporting "that the police had found a large sum of money, drugs, and guns at Mr. de la FUENTE's house." Juror Quick concluded that he was uncertain whether his verdicts

had been affected by juror Hunter's disclosures. The district court denied this motion on the ground that the evidence against de la FUENTE was so overwhelming that the introduction of extrinsic evidence could not have been prejudicial.

The Eleventh Circuit's August 15, 1986, opinion affirmed de la FUENTE's conviction on the ground that de la FUENTE had "waived" any right to a new trial on the basis of jury improprieties by failing to bring to the trial court's attention a hearsay report conveyed to de la FUENTE's counsel during deliberations that juror Hunter had expressed the opinion that de la FUENTE was guilty. De la FUENTE filed a Petition for Rehearing citing portions of the record establishing that the report heard by de la FUENTE's counsel during deliberations was a triple hearsay report conveyed in a

telephone conversation by the boyfriend of an unindicted co-conspirator and that there had been no suggestion whatsoever of any juror's exposure to prejudicial publicity until after the verdicts had been returned. On February 8, 1988, the Eleventh Circuit entered an opinion denying de la FUENTE's Motion for Rehearing and amending its prior opinion. The February 8, 1988, opinion conceded that de la FUENTE had not "waived" his right to request a new trial on the basis of the jury's exposure to prejudicial publicity. The Eleventh Circuit, however, expressly agreed with the trial court's denial of de la FUENTE's two motions for new trial "on the ground that the evidence against de la FUENTE was so overwhelming that the introduction of extrinsic evidence could not have been prejudicial."

On February 19, 1988, de la Fuente filed a Motion for Rehearing En Banc. That motion was denied without opinion on March 25, 1988.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DISPOSITION OF THIS CASE CONFLICTS WITH THIS COURT'S PRIOR PRECEDENT AND COMPELS AN EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY OVER THE FEDERAL CRIMINAL JUSTICE SYSTEM.

De la FUENTE was incarcerated on the basis of verdicts returned by jurors who had been exposed to prejudicial trial publicity that he had been arrested in possession of drugs, weapons, and a large amount of cash. Each of these items was relevant to establishing essential elements of the charged offenses. The relevance and prejudicial impact of a report that a defendant in a drug trial was arrested in possession of drugs is self-evident. The report that de la FUENTE had possession of a large amount of cash, in the context of trial testimony that de la FUENTE had received large amounts of cash from drug deals, was relevant to establishing an essen-

tial element of the CCE offense requiring receipt of substantial income from drug transactions. The report that de la FUENTE had weapons directly supported the Government's attempt to prove the continuing nature of the criminal enterprise through testimony that de la FUENTE displayed firearms in efforts to collect drug debts. The jury's exposure to extrinsic evidence in this case is particularly egregious because the report that "drugs" were found at de la FUENTE's home was false, and the reports regarding the weapons and the cash referred to evidence which had been suppressed by the trial court on Fourth Amendment grounds.

The jury's exposure to prejudicial publicity undercut de la FUENTE's defense. At the close of the Government's case, de la FUENTE's counsel had been relatively successful in establishing the chronic dis-

honesty of the indicted and unindicted co-conspirators who served as Government witnesses.[3] Consequently, de la FUENTE elected not to testify in his defense on the CCE charge because his testimony would have incriminated him in the remaining drug charges.[4] Instead, de la FUENTE relied upon his counsel's closing argument, which for three hours stressed that the jury should not believe corrupt witnesses testifying under favorable deals with the Government in the complete absence of any tangible evidence obtained by law enforcement authorities cor-

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[3]This is evidenced by the fact that the jury failed to reach unanimous verdicts on two counts of the indictment and failed to forfeit any of the five properties listed for forfeiture in the CCE count. The testimony of the Government's witnesses, if accepted as truth, would have compelled findings for the Government on all issues.

[4]De la FUENTE initially expressed his desire to testify in defense of the CCE charge in a pretrial motion for a bifurcated trial, which was denied.

roborating the testimony. While de la FUENTE's counsel made this argument, various jurors "knew" from their exposure to prejudicial publicity that the testimony had been corroborated.

The Eleventh Circuit agreed with the trial court that the jury taint was "harmless" in view of the "overwhelming" evidence of guilt presented at trial. The notion that "overwhelming" evidence of guilt may render "harmless" jury taint as egregious and fundamental as that which occurred in this case was rejected in Marshall v. United States, 360 U.S. 310 (1959).

The defendant in Marshall was convicted of unlawfully dispensing amphetamines without a prescription from a licensed physician. During the trial, various jurors were exposed to publicity reporting that the defendant had two previous felony convictions and

referencing the defendant's admission that he had practiced medicine without a license. The defendant moved for a mistrial, but the trial judge accepted the jurors' assurances that they "could decide the case only on the evidence of record." Id. at 312. This Court, however, ruled that the extrinsic information was sufficiently prejudicial to justify an exercise of "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts." Id. at 313. Accordingly, the Marshall court granted the defendant a new trial. See also, United States v. Williams, 568 F.2d 464 (5th Cir. 1978) (Marshall's standard applies when jurors are exposed to extrinsic information during trial and the information is probative of defendant's guilt).

In Murphy v. Florida, 421 U.S. 794 (1975), this Court distinguished the "consti-

tutional standard" generally applicable in juror taint cases from the "presumed prejudice" standard articulated in Marshall. The "constitutional standard," the Murphy court reasoned, hinges upon an evaluation of the possibility of "actual prejudice" to a defendant from publicity. In contrast, the Murphy court explained, the Marshall standard presumes prejudice to a defendant when jurors are exposed to prejudicial publicity during trial.

In United States v. Richardson, 651 F.2d 1251 (8th Cir. 1981), various jurors heard a news broadcast during trial reporting that a Government witness who had received threats because of her expected testimony in that trial had been shot and wounded. The trial court interviewed all of the jurors, determined that the defendant had not been prejudiced by the publicity, and denied the

defendant's motion for a new trial. On appeal, however, the Eighth Circuit applied the Marshall standard of presumed prejudice and remanded the case for a new trial.[5]

The Eleventh Circuit in this case collapsed Marshall's presumed prejudice standard into the constitutional standard's analysis of the possibility of actual prejudice. In Marshall, this Court did not disturb the trial court's finding that the defendant had not been prejudiced by the jury's exposure to trial publicity or concern itself with a factual determination of prejudice. Instead, the Marshall court, under its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the

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[5]To the extent that the Eleventh Circuit in this case limited Marshall's applicability to publicity reporting a defendant's prior convictions, certiorari review of this case is warranted on the basis of a conflict between the Eleventh Circuit and the Eighth Circuit.

federal courts," announced that the defendant should be granted a new trial due to the inherently prejudicial nature of the information which had reached the jurors. This Court, exercising its supervisory authority, should review the Eleventh Circuit's ruling to enforce compliance with Marshall.

A key question which merits this Court's consideration is whether "overwhelming evidence of guilt" may render harmless fundamental jury taint. Under the Eleventh Circuit's ruling, a defendant's right to an impartial jury deciding the case on the basis of evidence presented at trial becomes a function of the quality and quantity of the Government's evidence. In cases where the Government has "overwhelming" evidence, the Eleventh Circuit's ruling would nullify this right because no amount of jury taint possibly could impact on the inevitable outcome.

II. THIS COURT SHOULD UTILIZE ITS SUPERVISORY AUTHORITY AND ADDRESS ISSUES IGNORED BY THE ELEVENTH CIRCUIT.

The thrust of de la FUENTE's appeal was the fact that jurors were exposed to prejudicial publicity reporting that he had been arrested in possession of drugs, a large amount of cash, and weapons. Evidence that juror Hunter conveyed to other jurors newspaper reports that de la FUENTE had a large amount of cash "under a mattress" was established in the record in connection with de la FUENTE's initial motion for a new trial. Evidence that juror Hunter conveyed to other jurors newspaper reports that de la FUENTE had been arrested in possession of drugs and weapons was established in the record by juror Quick's affidavit in connection with de la FUENTE's subsequent motion for a new trial on grounds of newly discovered evidence.

The Eleventh Circuit purported to reach the merits of de la FUENTE's appeals from the trial court's denial of both of these motions and expressly "agree[d]" that denial of both motions was proper "on the ground that the evidence against de la FUENTE was so overwhelming that the introduction of extrinsic evidence could not have been prejudicial."

The Eleventh Circuit's February 8, 1988 opinion fails to mention the fact that jurors had been exposed to false newspaper reports reporting that de la FUENTE had been arrested in possession of drugs and weapons. Instead, the Eleventh Circuit merely notes that extrinsic information "regarding money allegedly found under de la FUENTE's mattress" was not sufficiently inflammatory to

require a new trial.[6] That ruling addressed only a minuscule portion of de la FUENTE's appeal. Apparently unable to bring itself to publicly invoke the harmless error doctrine to affirm a drug conviction where jurors had been exposed to false publicity reporting that the Defendant had been arrested in possession of drugs, the Eleventh Circuit simply ignored the strength of de la FUENTE's appeal.[7] This Court should exercise its supervisory authority to remedy this intolerable departure from the accepted course of appellate proceedings.

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[6]Since publicity reporting that de la FUENTE was arrested in possession of a large amount of cash was relevant to establishing an essential element of the CCE charge, this extrinsic information, standing alone, is sufficient to trigger the Marshall standard.

[7]The Eleventh Circuit also ignored any mention of jurors' exposure to information that de la FUENTE was arrested in possession of weapons.

It should be stressed that the Eleventh Circuit did not hold that de la FUENTE's motion for new trial on grounds of newly discovered evidence was untimely. Though the trial court's order denying that motion noted in dicta that juror Quick's affidavit filed as an exhibit to the motion was "untimely," the trial court reached the merits of the motion and held that "on the basis of the evidence, and the analysis of the evidence discussed in this Court's Order of July 19, 1984 [denying de la FUENTE's initial motion for a new trial], the motion is denied." The Eleventh Circuit's February 8, 1988, opinion abandoned any notion that juror Quick's affidavit had been "untimely" and expressly held that de la FUENTE's motion for new trial on grounds of newly discovered evidence had been properly denied by the trial court because

"the evidence against de la FUENTE was so overwhelming that the introduction of extrinsic evidence could not have been prejudicial."

In his initial brief to the Eleventh Circuit, de la FUENTE argued that, even if the trial court's dicta that the motion for new trial on grounds of newly discovered evidence was "untimely" is interpreted as a ruling, the ruling is not supported by the record. De la FUENTE's initial brief then cited the affidavit of counsel contained in the record establishing that de la FUENTE's counsel repeatedly attempted to contact juror Quick in preparation for the hearing on de la FUENTE's initial motion for a new trial but that juror Quick could not be contacted because he was on a trip abroad. The affidavit also establishes that de la FUENTE's counsel contacted juror Quick upon his return

from Europe, obtained an affidavit from juror Quick, and promptly filed the motion for new trial on grounds of newly discovered evidence. The Government never argued in this appeal, either in its answer brief or oral argument, that de la FUENTE's motion for a new trial on grounds of newly discovered evidence was untimely. The Eleventh Circuit panel, in lengthy oral arguments where the panel posed many questions to counsel, never raised any question regarding the timeliness of de la FUENTE's motion for new trial on grounds of newly discovered evidence. Neither the Eleventh Circuit's initial August 15, 1986, opinion nor its February 8, 1988, opinion addressed this point.

Since the Eleventh Circuit did not perceive the timing of de la Fuente's motion for new trial on grounds of newly discovered evidence as an issue, its failure to recog-

nize the issues raised by the motion is inexplicable. This departure from accepted judicial procedure should be remedied by this Court.

CONCLUSION

For the reasons set out in this petition, de la Fuente prays the Court grant this petition and review the relevant issues through a full briefing and oral argument.

Respectfully submitted,

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